82-7
No. ___

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOUIS HEIMBACH, individually and as the Orange County Executive; PETER REPLOGLE, individually and as the Director of the Orange County Employment and Training Administration; JUNE COOK, individually and as former Director of the Orange County Employment and Training Administration; LAWRENCE GASKINS, individually and as an employee of the Orange County Employment and Training Administration and the COUNTY OF ORANGE,

Petitioners,

—against—

HUDSON VALLEY FREEDOM THEATRE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Herbert Dicker
420 Lexington Avenue
New York, New York 10170
Telephone: (212) 490-3000
Attorney for Petitioners

Of Counsel:

James L. Fischer
WILSON, ELSER, EDELMAN & DICKER
420 Lexington Avenue
New York, New York 10170
Telephone: (212) 490-3000

July 2, 1982

QUESTIONS PRESENTED

1. Whether a not-for-profit corporation has a racial identity and, therefore, standing to maintain an action for money damages as the direct target of race discrimination in violation of the Fourteenth Amendment of the United States Constitution and Title VI of the Civil Rights Act of 1964 when that corporation was incorporated in order to produce theatrical and artistic productions which particularly reach the Black and Hispanic communities?

2. After this court's decision in *Arlington Heights** does the corporation described above have standing to seek money damages for race discrimination against itself without raising *jus tertii* or joining natural person plaintiffs?

PARTIES BELOW

The caption of the case contains the names of all parties to the proceeding in the Court whose judgment is sought to be reviewed.

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* *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

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IN THE

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OCTOBER TERM, 1982

No. __

LOUIS HEIMBACH, individually and as the Orange County Executive; PETER REPLOGLE, individually and as the Director of the Orange County Employment and Training Administration; JUNE COOK, individually and as former Director of the Orange County Employment and Training Administration; LAWRENCE GASKINS, individually and as an employee of the Orange County Employment and Training Administration and the COUNTY OF ORANGE,

Petitioners,

—against—

HUDSON VALLEY FREEDOM THEATRE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The District Court memorandum opinion and order dismissing the complaint in *Hudson Valley Freedom Theatre, Inc. v. Louis Heimbach, et al.* is reported at 513 F.Supp. 250 (S.D.N.Y. 1981) and is set forth in the Appendix at 16a-28a.

The opinion of the U.S. Court of Appeals for the Second Circuit, reversing the District Court in *Hudson Valley Freedom Theatre, Inc. v. Heimbach* is reported at 671 F.2d 702 (2nd Cir. 1982) and is set forth in the Appendix at 1a-10a. The concurring opinion of Pierce, Circuit Judge, is set forth in the Appendix at 11a-13a.

The Court of Appeals denied rehearing by its order entered on April 5, 1982 which is set forth in the Appendix at 30a-31a.

JURISDICTION

On February 1, 1982, the United States Court of Appeals for the Second Circuit rendered the judgment which petitioners seek to have reviewed. On April 5, 1982, that Court denied petitioners' timely petition for rehearing with a suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. XIV; Due Process and Equal Protection Clauses — A.32a[1]

42 U.S.C. § 1981 — A.32a

Civil Rights Act of 1871
42 U.S.C. § 1983 — A.32a

42 U.S.C. § 1985 — A.33a

Civil Rights Act of 1964; Tit. VI, Sec. 601
42 U.S.C. § 2000d — A.35a

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1 References to "A.___" are to appropriate pages of the Appendix to this petition.

STATEMENT OF THE CASE

Respondent Hudson Valley Freedom Theatre, Inc. (hereinafter referred to as "HVFT"), the district court plaintiff, is a not-for-profit tax-exempt corporation organized and existing under the laws of the State of New York and doing business in the Newburgh, New York, mid-Hudson area. HVFT seeks money damages under the Due Process and Equal Protection clauses of the Fourteenth Amendment, and under 42 U.S.C. §§ 1981, 1983, 1985 and 2000d for alleged race discrimination in connection with the disbursement of CETA[2] funds in Orange County, New York. HVFT is the only plaintiff in this action and HVFT expressly rejects (A.3a) all reliance upon the rights of third-party natural persons in bringing its race discrimination claims as a corporation.

HVFT has been in existence since 1972, and it alleges in its complaint that its purpose is "to produce theatrical and artistic productions in Orange County and the mid-Hudson area which particularly reach and involve the Black and Hispanic communities." (A.3a). HVFT further alleges in its complaint that it was incorporated in order to create a theatre which would "reflect the cultural needs, aspirations and creativity of the Black and Hispanic communities of the mid-Hudson area." (A.3a).

Petitioners, defendants in the District Court, are the Orange County executive, Louis Heimbach, and other past and present Orange County officials and administrators who played a part in disbursing CETA funds during fiscal year 1978. HVFT alleges that its application for $188,000 in CETA funds for fiscal year 1978 was not granted due to race discrimination[3] and that certain CETA funding due HVFT was terminated as a

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2 Orange County, through its Employment Training Administration ("ETA") administers a local program under the Comprehensive Employment and Training Act, 29 U.S.C. § 801 *et seq.* (CETA).

3 HVFT also brought a pendent contract claim regarding its CETA funding. The pendent contract claim is not at issue by this petition.

result of race discrimination. Other claims by HVFT which were contained in its complaint to the district court were not renewed on appeal and do not form a basis for this petition.[4]

On May 5, 1981, the United States District Court for the Southern District of New York (Brieant, J.) dismissed the race discrimination claims. The district court held that the corporate plaintiff had no racial identity and no standing to claim money damages as a result of race discrimination because the corporation itself could not be the direct target of the race discrimination alleged (A.23a) and because HVFT expressly declined to raise *jus tertii* (A.24a).

By its judgment entered on February 1, 1982 (A.14a), the United States Court of Appeals for the Second Circuit reversed and remanded, reinstating the corporation's claims of race discrimination under the equal protection clause of the Fourteenth Amendment and under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Judge Pierce concurred in the result in a separate opinion (A.11a-13a). On April 5, 1982, the Court of Appeals denied rehearing and declined Petitioner's suggestion for rehearing *en banc*. (A.30a). This petition for a writ of certiorari followed.

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4 HVFT additionally claimed damages under the Internal Revenue Code, 26 U.S.C. §§ 6103 and 7213, for wrongful disclosure of confidential tax information. The wrongful disclosure claims were dismissed by the district court (A.28a) and that dismissal was not appealed (A.3a).

REASONS FOR GRANTING THE WRIT

A court of appeals has repudiated this Court's axiomatic statement[3] of corporate standing to bring race discrimination claims; imbued a secular not-for-profit corporation with a racial identity[4] of its own; refused to accept the corporate respondent's declination to raise *jus tertii* of natural persons;[7] grafted a new federal remedy onto Title 6 of the Civil Rights Act of 1964 which heretofore vindicated only the rights of natural persons; and then thrice challenged[8] this Court to reverse upon *stare decisis*. Unimpeded by the decisions of this

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5 As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination.

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 263 (1977).

6 According to its complaint the purpose of HVFT is "to produce theatrical and artistic productions in Orange County and the Mid-Hudson area which particularly reach and involve the Black and Hispanic communities," and "which . . . reflect the cultural needs, aspirations and creativity of the Black and Hispanic communities of the Mid-Hudson area."

Hudson Valley Freedom Theatre, Inc. v. Heimbach, 671 F.2d 702, 703 (2d Cir. 1982), (A.3a).

HVFT is in a better position than anyone else to challenge discriminatory practices leading to cutting its grant funds.

Id. at 706, (A.10a).

7 There are no individual plaintiffs and HVFT explicitly affirms that it is suing solely on its own behalf.

HVFT, 671 F.2d at 703, (A.3a).

8 Although a literal reading of one sentence in the *Arlington Heights* opinion indeed supports the [district court] judge's ruling, the sentence was of only academic importance and we do not believe that the Supreme Court would slavishly apply it so as to deny HVFT its day in court.

HVFT, 671 F.2d at 704, (A.5a).

We agree in finding it hard to believe that the Supreme Court would deny standing to the corporation because it "has no racial identity and

Court, the corporate respondent may now continue its race discrimination suit for money damages; yet it need not include as a party even one minority natural person in its action, nor raise the rights of any third-party natural person claimed to be the direct target of the race discrimination alleged in its complaint. Petitioners must return to district court and defend an action brought by a creature of statute now judicially cloaked in the most personal and sensitive of individual traits with which only natural persons were previously endowed.

The District Court relied heavily upon this Court's decision in *Arlington Heights,* and the Court of Appeals devoted a substantial portion of its opinion to a dissection of the *Arlington Heights* holding. Petitioners respectfully submit that in *Arlington Heights,* when it was said that the corporate plaintiff there had "no racial identity and cannot be the direct target of the petitioner's alleged discrimination," 429 U.S. at 263, this Court recognized a necessary characteristic, both of corporate plaintiffs who may not, and of natural person plaintiffs who may stand before our Federal Courts to assert their own rights to be free from race discrimination directed at them.

A corporation's claims of race discrimination are strictly unintelligible without reference to the race and rights of third party natural persons. Thus, after this Court's fundamental statement that a corporation has no racial identity and cannot

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> cannot be the direct target" of the discrimination, while at the same time it would be obliged to deny standing to the stockholders on the sound ground that the injury was suffered by the corporation and not by them.

Id. at 706, (A.9a).

> Thus, we predict that, despite the sentence in the *Arlington Heights* opinion, the Supreme Court would hold that HVFT has standing to assert claims of racial discrimination.

Id. at 707, (A.10a).

be the direct target of race discrimination,[9] its *Arlington Heights* analysis turned to *jus tertii*. The issues which MHDC could litigate on remand involved the rights of others and not any rights of its own[10] but because at least one of those others, an individual plaintiff named Ransom, was actively pursuing vindication of his own rights, the question of MHDC's prudential standing to raise *jus tertii* was not resolved.

In spite of the necessary focus[11] in an analysis of "standing" as suggested by the very imagery of that term, the Court of Appeals in the case at bar reversed upon findings that "HVFT is in a better position than anyone else to challenge discriminatory practices leading to cutting its grant funds. . ." and that "HVFT has a far more solid claim of injury in fact than would

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9 The allegations of HVFT's complaint squarely allege racial discrimination against the corporate plaintiff (A.23a, n.3).

10 Although MHDC had standing in its own right to challenge "arbitrary and irrational zoning actions," 429 U.S. at 263, it could not, due to its corporate nature, raise constitutional claims that the Village of Arlington Heights' refusal to rezone discriminated against MHDC as a racial minority group member. In the strictest sense, MHDC had no Article III standing to claim discrimination against itself as a racial minority group member because MHDC did not possess a racial identity without which any claims of discrimination against itself were illusory. Since HVFT in the case at bar does not make the argument that it is entitled to assert *jus tertii*, 671 F.2d at 705 (A.7a), *Arlington Heights* not only "reads directly on HVFT", 671 F.2d at 705 (A.7a), but it is controlling. In *Arlington Heights*, MHDC's Fourteenth Amendment claims of discrimination targeted at the corporation were not allowed to stand; neither should HVFT's claims remain here. Certainly, HVFT's allegations under the Civil Rights Act of 1964, 42 U.S.C. § 2000d, a statute whose congressional history is steeped in statements of individual rights and whose constitutional authority is provided by the Fourteenth Amendment, should carry no greater weight than the constitutional amendment which gives that statute vitality.

11 "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a Federal Court and not on the issues he wishes to have adjudicated."

Flast v. Cohen, 392 U.S. 85, 99 (1968).

any resident who would have to allege an interest in attending as yet unannounced productions, or a prospective employee who might be only one of many that would seek to apply for positions not yet offered as a result of CETA's denial of the grant." 671 F.2d at 706, (A.10a). Yet prudential standing is not at issue, and HVFT does not raise the rights of any third parties.[12] Thus, we respectfully submit that in this case as in any other "[the] assumption that, if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 227 (1974).

More fundamentally, the Court of Appeals' decision which now grants substantial license to corporations claiming race discrimination is an invitation to the wholesale creation of subject matter jurisdiction. *Cf., Kramer v. Caribbean Mills, Inc.,* 394 U.S. 823 (1969) (assignment of rights collusively created diversity); 28 U.S.C. § 1359. By granting HVFT standing upon the ground of its corporate purpose and upon the intent of its incorporators, the Court of Appeals provided the corporation with a practical racial identity according to the preference expressed in its charter. Might we also look to HVFT's officers, directors, shareholders and employees or to its "constituency" of Hudson Valley theatergoers? The Court of Appeals' reference to HVFT's corporate purpose effectively gave HVFT a racial identity and its judgment was therefore in derogation of *Arlington Heights.*

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12 Although the Court of Appeals twice recited the fact that HVFT raises the right of no third parties, 671 F.2d at 703 and 705 (A.3a and A.7a), see also District Court Opinion, 513 F.Supp. at 254-55, n.3 (A.23a), the Court of Appeals' reasoning inexplicably relies heavily upon examples and analyses of third party rights and of HVFT's posture as a proper prudential plaintiff. Yet HVFT claimed only in its own behalf. Upon the facts of the case at bar, corporations may now bring race discrimination claims in the Second Circuit under 42 U.S.C. § 2000d without raising *jus tertii* whatsoever and without resort to a prudential analysis of corporate standing to raise *jus tertii.*

Race and color are but two of the inherently personal characteristics for which only natural persons may suffer direct injury. It is difficult to conceive a situation where a corporation could sue as the direct object of sex discrimination, age discrimination, discrimination against the physically handicapped, or discrimination on the ground of national origin. Indeed, in *National Organization for Women—New York Chapter* v. *Goodman,* 374, F.Supp. 247 (S.D.N.Y. 1974) a representative organization, "devoted to ending sex discrimination," 374 F.Supp. at 248, was denied standing to speak for its members in a civil rights case alleging sex discrimination in jury empaneling in New York County. May foreign country corporations licensed to do business in the United States now claim discrimination on the ground of race and national origin under the Fourteenth Amendment or the 1964 Civil Rights Act?

In *Arlington Heights,* this Court found that the Article III requirement of injury in fact was met by reason of alleged economic injury and by MHDC's interest in making suitable low-cost housing available in areas where such housing is scarce. Yet the analysis of MHDC's standing never progressed beyond its ability to assert its own rights. The heart of MHDC's claim was race discrimination, and when this Court held that MHDC had no racial identity and could not be the direct target of race discrimination, it held that MHDC, by the very reason of its corporate nature did not possess the rights necessary to maintenance of the discrimination action. The nature of the statutory and constitutional claims in *Arlington Heights* is then rendered of paramount importance in analyzing HVFT's action.

HVFT's claims herein were reinstated by the Court of Appeals under the Fourteenth Amendment and under Title VI of the Civil Rights Act of 1964. In reinstating HVFT's claims under Title VI the Court noted that 42 U.S.C. § 2000d "does not say 'No person in the United States shall, on the ground of *his* race, color or national origin' etc." and then concluded that "we perceive no reason to read it as if it did." HVFT, 671 F.2d

at 705 (A.8a). However, in addressing the statutory language,[13] the Court of Appeals did not acknowledge this Court's leading analysis of the legislative intent underlying Title VI. *Regents of the University of California* v. *Bakke*, 436 U.S. 265 (1978).

Although *Bakke* was presented within the factual context of the remedial use of a racial classification, *Bakke* stands for the proposition that Title VI reaches as far as the Fourteenth Amendment. As a result, the *Arlington Heights* racial identity analysis under the Fourteenth Amendment should apply equally to HVFT's Title VI claims. As the *Bakke* Court found,

> Although isolated statements of various legislators, taken out of context, can be marshaled in support of the proposition that § 601 enacted a purely color-blind scheme, without regard to the reach of the Equal Protection Clause, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.
>
> The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys.

Bakke, 438 U.S. at 284-85. (Footnote omitted).

> Further evidence of the incorporation of a constitutional standard into Title VI appears in the repeated refusals of the legislation's supporters precisely to define the term "discrimination." Opponents sharply criticized this failure, but proponents of the bill merely replied that the meaning of "discrimination" would be made clear by reference to the Constitution or other existing law. For example, Senator Humphrey noted the relevance of the Constitution:

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13 The Court of Appeals' statutory analysis was neither briefed nor argued below; the legislative history of 42 U.S.C. § 2000d was not explored nor articulated prior to the Court's *sua sponte* reading of its gender neutral verbiage.

> "As I have said, the bill has a simple purpose. That purpose is to give fellow citizens—Negroes—the same rights and opportunities that white people take for granted. This is no more than what was preached by the prophets, and by Christ Himself. It is no more than what our Constitution guarantees." [110 Cong.Rec.] at 6553 [(1964)].

Id. at 286-87. (Footnotes omitted).

In light of *Bakke,* Title VI should be recognized as a remedial vehicle for vindication of existing constitutional rights. *Compare Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 618 (1979) (". . . § 1983 does not provide any substantive rights at all. . . . The act only gives a remedy.") with *Bakke.*

In the absence of the Fourteenth Amendment rights HVFT would assert, *Arlington Heights,* and in light of Title VI's congruence with the scope of the Fourteenth Amendment, *Bakke,* Article III is seen as an absolute constitutional bar to HVFT's maintenance of the instant action.

The case at bar presents the pure issue of corporate standing to claim racial discrimination because there is but a single plaintiff, the Hudson Valley Freedom Theatre, Inc. Further, HVFT unambiguously disavows reliance on *jus tertii,* thereby tendering the standing issue with precision and clarity. Significantly, absent special circumstance, "[a litigant] must assert his own legal interests rather than those of third parties." *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979) (citations omitted). ". . . [T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 499 (1975) (citations omitted). ". . . [W]here, although there is damage, there is no violation of a right no action can be maintained." *Alabama Power Co. v. Ickes,* 302 U.S. 464, 479 (1938).

> Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." The constitutional power of the federal courts cannot be defined, and indeed has no substance, without reference to the necessity "to adjudge the legal rights of litigants in actual controversies." *Liverpool Steamship Co. v. Commissioners of Emigration,* 113 U.S. 33, 39 (1885).

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., ____ U.S. ____, 102 S.Ct. 752, 757 (1982)

The Court of Appeals decision steps beyond constitutionally permissible remedies because it enforces corporate rights which do not exist. Even as the Acts of Congress should not be struck down for failing to meet the Court's standards of social policy, "wisdom" or "common sense", see *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 194-195 (1978), the Courts should not stretch the fabric of our Constitution beyond its limitations in order to provide remedies which Congress did not intend. In traditional terms of standing jurisprudence, corporate plaintiffs are not "within the zone of interests to be protected," *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 153 (1969), by Title VI from race discrimination. In order for a corporation such as HVFT to allege damage from race discrimination it must identify those natural persons against whom the discrimination is targeted and clearly raise *jus tertii* if those natural persons are not joined in the action.

The Court of Appeals decision herein squarely conflicts with this Court's opinion in *Arlington Heights,* and presents an "unusually broad and novel view of standing to litigate a substantive question in the federal courts," *Valley Forge,* ____ U.S. at ____, 102 S.Ct. at 757. The reasons for granting the writ are compelling and the issue presented is in need of prompt resolution by this Court.

CONCLUSION

The corporate plaintiff which raises no *jus tertii* herein has no standing to claim race discrimination against itself under the Fourteenth Amendment or under Title VI of the Civil Rights Act of 1964 due to its lack of racial identity and lack of corollary constitutional rights; yet the Court of Appeals has spurned this Court's *Arlington Heights* decision and effectively given the Hudson Valley Freedom Theatre, Inc. a racial identity upon which to sue and a forum in which to stand. The issue presented by this petition is unambiguous and unclouded by the presence of third party natural persons to whose rights the Court of Appeals alluded but none of whom are litigants in the action.

The petition for a writ of certiorary should be granted.

Respectfully submitted,

Herbert Dicker
420 Lexington Avenue
New York, New York 10170
Telephone: (212) 490-3000

Attorney for Petitioners

Of Counsel:

James L. Fischer
WILSON, ELSER, EDELMAN & DICKER
420 Lexington Avenue
New York, New York 10170
Telephone: (212) 490-3000

July 2, 1982

Court of Appeals Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 292—August Term 1981

(Argued October 29, 1981 Decided February 1, 1982)

Docket No. 81-7425

HUDSON VALLEY FREEDOM THEATER, INC.,

Plaintiff-Appellant,

—v.—

LOUIS HEIMBACH, individually and as the Orange County Executive; PETER REPLOGLE, individually and as the Director of the Orange County Employment and Training Administration; JUNE COOK, individually and as former Director of the Orange County Employment and Training Administration; LAWRENCE GASKINS, individually and as an employee of the Orange County Employment and Training Administration and the COUNTY OF ORANGE,

Defendant-Appellees.

Before:

FEINBERG, *Chief Judge,*
FRIENDLY and PIERCE, *Circuit Judges.**

Appeal from an order of the District Court for the Southern District of New York, Charles L. Brieant, *Judge,* which dismissed for lack of standing a complaint in which a theatre incorporated for the purpose of serving the needs of black and Hispanic communities sought damages and injunctive relief because of defendants' denial of funds under the Comprehensive Employment and Training Act allegedly as the result of racial discrimination. Reversed.

WILLIAM M. KUNSTLER, Esq., New York, N.Y. (C. Vernon Mason, Esq., New York, N.Y., James I. Meyerson, Esq., New York, N.Y. and Mark B. Gombiner, Esq., New York, N.Y., Of Counsel), *for Plaintiff-Appellant*

JAMES L. FISCHER, Esq., New York, N.Y. (Wilson, Elser, Edelman & Dicker, New York, N.Y., Herbert Dicker, Esq., Of Counsel), *for Defendant-Appellees*

* When this appeal was heard, Judge Pierce was a District Judge for the Southern District of New York, sitting by designation. He was inducted as a judge of this court on November 30, 1981.

FRIENDLY, *Circuit Judge:*

This is an appeal from the dismissal by the District Court for the Southern District of New York for lack of standing of an action involving alleged violations of the civil rights laws, 42 U.S.C. §§ 1981, 1983, 1985, and 2000d, and the equal protection and due process clauses of the Fourteenth Amendment.[1]

The plaintiff, Hudson Valley Freedom Theatre, Inc. (HVFT), is a not-for-profit, tax-exempt corporation which was organized in 1972 and serves the Newburgh, New York area. There are no individual plaintiffs and HVFT explicitly affirms that it is suing solely on its own behalf. According to its complaint the purpose of HVFT is "to produce theatrical and artistic productions in Orange County and the Mid-Hudson area which particularly reach and involve the Black and Hispanic communities", and "which . . . reflect the cultural needs, aspirations and creativity of the Black and Hispanic communities of the Mid-Hudson area." HVFT claims to have received financial support from a variety of public and private sources for this purpose and to have "earned and received substantial community support."

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1 Plaintiff also alleged disclosure by one of the defendants of confidential tax information in violation of I.R.C. §§ 6103 and 7213. The district court dismissed these allegations for failure to state a claim and plaintiff did not appeal.

In addition, plaintiff alleged that defendants wrongfully denied it funding in violation of "the regulations and directives promulgated [under the Comprehensive Employment and Training Act, 29 U.S.C. § 801 *et seq.* (CETA)] and agreements adopted pursuant thereto". The district court understandably was unclear whether plaintiff's claim was based on a breach of contract theory or on violations of CETA. It dismissed the count, however, on the grounds that CETA does not provide a cause of action for damages against "prime sponsors", such as Orange County and plaintiff has not questioned that decision. The district court also held that, to the extent plaintiff's claim was based on a contract theory, the dismissal of plaintiff's other claims and the absence of diversity required dismissal of this common law claim. In light of our disposition of plaintiff's civil rights claims, the district court should reconsider whether pendent jurisdiction would permit resolution of plaintiff's contract claim.

The defendants in the present action are the County of Orange and various of its present and past officials and administrators. Defendant Louis Heimbach is the County Executive of Orange County and, according to plaintiff, is responsible for the administration of the County's program under the Comprehensive Employment and Training Act, 29 U.S.C. § 801 *et seq.* (CETA). Defendant Peter Replogle is the Director of Orange County's Employment and Training Administration (ETA), a county agency charged with administering the local CETA program. Also named as defendants are June Cook, Director of ETA at the time plaintiff's claims arose, and Lawrence Gaskins, an employee of ETA.

HVFT's claims are based principally upon two instances of alleged racially discriminatory conduct by the defendants. HVFT's primary allegation relates to its application to the Orange County ETA in the summer of 1978 for CETA funds for a project entitled "Expansion of the Theatre Arts Industry in the Greater Newburgh Community". This application, which sought some $188,000 for "compilation of a theatre directory and production of eleven plays which would be performed by a touring troupe at area colleges, high schools and at other locations", was denied. The plaintiff, pointing to allegedly "improper, biased and perjurative [sic] comments" by defendant Gaskins on an ETA form rating the project, claims that ETA's denial was racially motivated. HVFT's further allegations focus on an alleged "series of actions [undertaken by defendants] which were designed to, and did in fact, discourage the HVFT's activity as a CETA sub-contractor." Plaintiff alleges, *inter alia,* that defendants "inordinately delayed" two of HVFT's previously approved ETA youth programs and discontinued two Title II Public Service Employment positions and a "restoration trainee" position in HVFT projects. Moreover, plaintiff alleges that various defendants made unfavorable public statements about HVFT and initiated inquiries into HVFT affairs, both "with the attempted purpose

of discrediting" the theatre. Plaintiffs allege that these actions were motivated by racial animus.[2]

The district judge dismissed this portion of the complaint for lack of standing. Relying on language of the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977), which we quote below, he reasoned that "a corporation, as a faceless creature of the state, may not assert claims of racial discrimination under the Fourteenth Amendment on its own behalf, and cannot be the 'target' of racial discrimination." Although a literal reading of one sentence in the *Arlington Heights* opinion indeed supports the judge's ruling, the sentence was of only academic importance and we do not believe that the Supreme Court would slavishly apply it so as to deny HVFT its day in court.

Arlington Heights involved a refusal by a village of that name, allegedly on racial grounds, to permit the rezoning from a single family to a multiple family classification of a tract on which Metropolitan Housing Development Corporation (MHDC), a non-profit corporation, proposed to construct racially integrated low and moderate income housing to be known as Lincoln Green. MHDC and three individuals seeking to represent a class of "low and moderate income minority-group members who work or desire to work in Arlington Heights but cannot find decent housing in Arlington Heights at rents they can afford", 373 F.Supp. 208, 209-10 (N.D. Ill. 1974), brought an action asking declaratory and injunctive relief on the basis of the Equal Protection clause of the

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2 In July and November of 1978 HVFT complained to the Department of Labor, alleging that defendants had racially discriminated against it. The Department of Labor investigated plaintiff's charges and, in July 1979, informed HVFT that it had been "unable to substantiate [HVFT's] allegation of racial discrimination." It did direct, however, that two of the HVFT positions abolished by the Orange County ETA should be restored and that HVFT's theatre arts project application should be reevaluated. HVFT asserted that the Department's remedy was inadequate and sought money damages, which the Department indicated that it does not award.

Fourteenth Amendment and the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* The district court dismissed the complaint primarily for failure to establish that the denial of the rezoning was racially motivated, 373 F.Supp. at 211, but the Court of Appeals, "proceeding in a somewhat unorthodox fashion," 429 U.S. at 271, reversed on the constitutional claim, 517 F.2d 409 (7 Cir. 1975), without considering the statutory one; it held that disparate impact sufficed to establish a violation of the Equal Protection Clause. The Supreme Court reversed this constitutional holding.

The district judge in *Arlington Heights* had assumed that MHDC had standing, apparently on the basis of a ruling by a predecessor judge, see 373 F.Supp. at 209, and the question was not discussed in the opinion of the court of appeals. In the Supreme Court MHDC's standing was challenged. The Court first concluded that "there can be little doubt that MHDC meets the constitutional standing requirements." 429 U.S. at 261. It had "shown an injury to itself that is 'likely to be redressed by a favorable decision.' " *Id.* at 262, quoting from *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38 (1976). The Court refused to accept the Village's argument "that MHDC lacks standing because it has suffered no economic injury." 429 U.S. at 262. MHDC had expended thousands of dollars for plans and studies many of which would be rendered useless if the denial of the requested rezoning were to stand. *Id.* Even more important, "[i]t has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing. . . . [MHDC's] interest in building Lincoln Green stems not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce." *Id.* at 262-63. This was "not mere abstract concern about a problem of general interest." *Id.* at 263, citing *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972). "The specific project MHDC intends to build, whether or not it will generate profits, provides that 'essential dimension of specificity' that informs judicial decisionmaking." 429 U.S. at 263, quoting

from *Schlesinger v. Reservists to Stop the War,* 418 U.S. 208, 221 (1974). "Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights." 429 U.S. at 263. This discussion reads directly on HVFT; indeed the district judge did not question that it had met constitutional standing requirements.

The *Arlington Heights* opinion went on to discuss the further "prudential" considerations required for standing. MHDC's rights, it continued, included the "right to be free of arbitrary or irrational zoning actions." *Id.* However, "the heart of this litigation has never been [such a] claim. . . . Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment." *Id.* Then came the sentence here relied on by the defendants and the district court, *id.:*

> As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination.

But the Court did not leave the matter there. Dealing with what had in fact been MHDC's argument but is not HVFT's, namely, that it was entitled to assert *jus tertii,* the Court said, 429 U.S. at 263-64:

> In the ordinary case, a party is denied standing to assert the rights of third persons. *Warth v. Seldin,* 422 U.S. at 499. But we need not decide whether the circumstances of this case would justify departure from that prudential limitation and permit MHDC to assert the constitutional rights of its prospective minority tenants. See *Barrows v. Jackson,* 346 U.S. 249 (1953); cf. *Sullivan v. Little Hunting Park,* 396 U.S. 229, 237 (1969); *Buchanan v. Warley,* 245 U.S. 60, 72-73 (1917). For we have at least one individual plaintiff who has demonstrated standing to assert these rights as his own. (Footnote omitted).

The individual, one Ransom, was a black working in Arlington Heights and living 20 miles away, who testified that if Lincoln Green were built, he would probably move there.[3]

The Court therefore never did resolve the question of MHDC's standing, and the cases cited by it indicate that any resolution might well have been favorable. Moreover the entire discussion was in the context of the Fourteenth Amendment, whereas here the plaintiff seeks relief also on the basis of 42 U.S.C. § 2000d, which says that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The statute does not say "No person in the United States shall, on the ground of *his* race, color, or national origin" etc., and we perceive no reason to read it as if it did. *Arlington Heights* was scarcely meant to qualify the statement in *Warth v. Seldin*, 422 U.S. 490, 500 (1975), written by the same Justice, that in applying the prudential rules of standing, the question "is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." (Footnote omitted.) It is thus consistent with even a literal reading of the *Arlington Heights* opinion to hold that HVFT has met all standing requirements with respect to its statutory claim. Compare *Des Vergnes v. Seekonk Water District*, 601 F.2d 9, 13-14 (1 Cir. 1979).

A further distinction of the sentence in *Arlington Heights* is that HVFT was established for the very purpose of advancing minority interests, whereas for MHDC this was simply an incidental, although important, by-product. It is not apparent why a corporation, although entitled to advance equal protec-

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[3] It is worth noting that the argument that MHDC had standing to assert its own rights, in contrast to the rights of potential tenants, received only the slightest mention in the briefs.

tion challenges based on inequality in taxation or regulation,[4] should lack standing to complain of discrimination because of its activities or stock ownership based on racial grounds—the core of the equal protection clause. At oral argument appellant's counsel posed the hypothetical of a city's denial of contracts to a construction company because it was owned by blacks. We agree in finding it hard to believe that the Supreme Court would deny standing to the corporation because it "has no racial identity and cannot be the direct target" of the discrimination, while at the same time it would be obliged to deny standing to the stockholders on the sound ground that the injury was suffered by the corporation and not by them. The principle that a corporation may assert equal protection claims when it alleges discrimination because of the color of its stockholders derives implicit support from *Fullilove v. Klutznick*, 448 U.S. 448, 455 (1980), which entertained, without suggesting any question of standing, a complaint of "several associations of construction contractors and subcontractors, and a firm engaged in heating, ventilation, and air conditioning work" against § 103(f)(2) of the Public Works Employment Act of 1977, which amended Local Public Works Capital Development and Investment Act of 1976, 42 U.S.C. §§ 6701 *et seq.* so as to require a 10% set-aside for minority business enterprises.[5] See also *T&S Associates, Inc. v. Crenson*,

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4 That a corporation is a "person" within the meaning of the Fourteenth Amendment was initially held in *Santa Clara County v. Southern Pacific R.R. Co.*, 118 U.S. 394, 396 (1886), where the Court declined even to hear argument on the point. The Court adhered to this view in *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938), over a dissent by Justice Black, *id.* at 85, and in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), over a dissent by Justices Douglas and Black, *id.* at 576.

5 See 448 U.S. at 478 (opinion of Burger, C.J.) ("ensur[ing] [minority] businesses . . . equal opportunity to participate in federal grants to state and local governments . . . is one aspect of the equal protection of the laws"); *id.* at 527 (Stewart, J., dissenting) ("The statute . . . bars a class to which the petitioners belong from having the opportunity to receive a government benefit, and bars the members of that class solely because of their race . . . . This is precisely the kind of law that the guarantee of equal protection forbids.").

505 F.Supp. 938 (D.R.I. 1981) (suit by corporation and its sole shareholder, a black, under 42 U.S.C. §§ 1981, 1983 and 2000d for alleged racial discrimination in the award of a contract for the provision of school lunches; held that the shareholder did not have standing but that the corporation did).

When a corporation meets the constitutional test of standing, as HVFT admittedly does, prudential considerations should not prohibit its asserting that defendants, on racial grounds are frustrating specific acts of the sort which the corporation was founded to accomplish. Such recognition is supported by the indication in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978), that one of the reasons for prudential limitations on standing is to obtain "the assurance that the most effective advocate of the rights at issue is present to champion them." HVFT is in a better position than anyone else to challenge discriminatory practices leading to cutting its grant funds. In addition, HVFT has a far more solid claim of injury in fact than would any resident who would have to allege an interest in attending as yet unannounced productions, or a prospective employee who might be only one of many that would seek to apply for positions not yet offered as a result of ETA's denial of the grant. It would indeed by paradoxical if prudential standing considerations were to limit the range of permissible plaintiffs in a case like this to those who would be required to file complaints indulging in the sort of speculation which the Court has found suspect under its constitutional standing analysis. See *Warth v. Seldin, supra*, 422 U.S. at 502-08. Thus, we predict that, despite the sentence in the *Arlington Heights* opinion, the Supreme Court would hold that HVFT has standing to assert claims of racial discrimination.

The judgment dismissing the complaint on the ground of HVFT's lack of standing to raise questions under the Equal Protection clause and 42 U.S.C. § 2000d is reversed and the cause is remanded for further proceedings consistent with this opinion.

PIERCE, *Circuit Judge* (Concurring):

I concur with the majority in its holding that Hudson Valley Freedom Theater, Inc. ("HVFT"), albeit a corporate entity, has standing to sue when, as a result of conduct based upon allegedly racially discriminatory intent, it is thwarted in performing "specific acts of the sort which the corporation was founded to accomplish." *Ante*, at ____. I would prefer to reach that result, however, by a somewhat different path.

As the majority points out, HVFT has alleged that defendants' actions have (1) caused it economic injury and (2) frustrated its attempts to fulfill its corporate purposes. Thus, it has made the allegations of "demonstrable, particularized injury" required by *Warth v. Seldin*, 422 U.S. 490, 508 (1975). Since it has alleged that it " 'personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' " *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 50 U.S.L.W. 4103, 4105 (1/12/82) (citations omitted), HVFT's claim is not barred by either constitutional or prudential limitations as to standing.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Supreme Court stated conclusively that "a corporation . . . has no racial identity and cannot be the direct target of the . . . alleged discrimination." 429 U.S. at 263. While this statement was not necessary to the holding in that case, it does reflect the Supreme Court's view on the narrow issue of whether a corporation can itself be considered to have a racial character.[1] However, I agree with the majority that this statement does not preclude HVFT from maintaining this action merely because it is a corporation. As the majority points out, the *Arlington Heights* Court continued its discussion and stated that it did not need to decide whether the corporate plaintiff might have

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1 A different result no doubt would obtain when there is legislation that explicitly addresses the matter. *See, e.g.*, 42 U.S.C. § 6705(f)(2).

standing to "assert the constitutional rights of its prospective minority tenants. See *Barrows v. Jackson*, 346 U.S. 249 (1953); cf. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237 (1969); *Buchanan v. Warley*, 245 U.S. 60, 72-73 (1917)." 429 U.S. at 263-64.

I believe that, in spite of the Court's reference to *jus tertii* principles in *Arlington Heights*, the citation of *Barrows*, *Sullivan*, and *Buchanan* is of broader significance with respect to HVFT's standing, quite apart from the issue as to whether a corporation does or does not have a racial identity. Like the First Circuit in *Des Vergnes v. Seekonk Water District*, 601 F.2d 9 (1st Cir. 1979), and this Circuit in *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, *modified*, 520 F.2d 409 (2d Cir. 1975), I read *Sullivan*, *supra*, as standing for the proposition that in order to invoke the protection of 42 U.S.C. § 1981 "one need not be a member of the racial class protected by the statute and one need not even be able to identify any specific member of the class who suffered or may suffer discrimination." 601 F.2d at 14.

Section 5 of the 14th Amendment gives Congress the power to enact legislation in order to enforce the provisions of that amendment. It was under this authority and with this purpose that Congress enacted, *inter alia*, 42 U.S.C. §§ 1981, 1983, 1985 and later 2000d. In *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 72 (1873), the Supreme Court stated that "in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all [the 13th, 14th and 15th], the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it." This purpose, as later interpreted, was to assure the common enjoyment of civil rights to all persons regardless of race.[2] *Buchanan v. Warley*, *supra*, at

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2 Although the original purpose of the 14th Amendment was to protect the civil rights of black persons, it was recognized very early that its protections would extend to members of other minority groups. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 72 (1873).

76; *The Slaughterhouse Cases, supra,* at 72. In *Barrows, supra,* at 257, *Buchanan, supra,* at 78, and *Sullivan, supra,* at 237, the Court pointed out that this aim cannot be accomplished if a white person could be "punished for trying to vindicate the rights of minorities," 396 U.S. at 237, and then could be held to be without standing to sue. Further, any such "narrow construction of the language of [the relevant civil rights statutes] would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded . . . ." *Id.* at 237. *See also DeMatteis v. Eastman Kodak Co., supra,* at 312. That being so, I would hold that under the 14th Amendment and the statutes which seek to implement its purposes, *any person,* including a colorless corporate "person", although not a member of a protected group, has an implied cause of action against any other person who, with racially discriminatory intent, causes him (or it) direct injury. *See Des Vergnes v. Seekonk Water Dist., supra,* at 14; *cf. Winston v. Lear-Siegler, Inc.,* 558 F.2d 1266, 1270 (6th Cir. 1977); *Kennedy Park Homes Ass'n v. City of Lackawanna,* 436 F.2d 108, 112 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).

The burden will be upon HVFT to establish in the district court its contention that defendants' denial of the funds it has requested caused it injury in light of its corporate purposes and that, in addition, this was motivated by racial animus.[3]

In light of the above, whether HVFT, as a corporation, does or does not have a racial identity is irrelevant, and I see no need to predict how the Supreme Court might rule if directly confronted with the issue.

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3 The required animus and discriminatory intent could be the result of, among other things, plaintiff's entering into contracts with minority group members (*see, e.g., Barrows v. Jackson,* 346 U.S. 249 (1953); *Des Vergnes v. Seekonk Water District,* 601 F.2d 9 (1st Cir. 1979); *DeMatteis v. Eastman Kodak Co.,* 511 F.2d 306, *modified,* 520 F.2d 409 (2d Cir. 1975)); plaintiff's advocating the protection of the rights of minority group members (*see, e.g., Sullivan v. Little Hunting Park,* 396 U.S. 229 (1953); *Winston v. Lear-Siegler, Inc.,* 558 F.2d 1266 (6th Cir. 1977)); ownership of a plaintiff corporation by minority group members (*see, e.g., T&S Associates, Inc. v. Crenson,* 505 F.Supp. 938 (D.R.I. 1981)); or, as alleged here, plaintiff's attempt to serve the cultural interests of minority group members.

Court of Appeals Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

#81-7425

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of February one thousand nine hundred and eighty-two.

Present:

HON. WILFRED FEINBERG, CH.J.,
HON. HENRY J. FRIENDLY,
HON. LAWRENCE W. PIERCE,
Circuit Judges.

HUDSON VALLEY FREEDOM THEATER, INC.,

Plaintiff-Appellant,

—v.—

LOUIS HEIMBACH, individually and as the Orange County Executive; PETER REPLOGLE, individually and as the Director of the Orange County Employment and Training Administration; JUNE COOK, individually and as former Director of the Orange County Employment and Training Administration, et al.,

Defendant-Appellees.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appelles.

A. Daniel Fusaro, *Clerk*

by s/ ARTHUR HELLER,
Deputy Clerk

District Court Memorandum and Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 5914-CLB

HUDSON VALLEY FREEDOM THEATRE, INC.,

Plaintiff,

—against—

LOUIS HEIMBACH, individually and as the Orange County Executive; PETER REPLOGLE, individually and as the Director of the Orange County Employment and Training Administration; JUNE COOK, individually and as former Director of the Orange County Employment and Training Administration; LAWRENCE GASKINS, individually and as an employee of the Orange County Employment and Training Administration; and THE COUNTY OF ORANGE,

Defendants.

MEMORANDUM AND ORDER

Brieant, J.

In this action, plaintiff Hudson Valley Freedom Theatre, Inc. ("HVFT"), a not-for-profit, tax-exempt organization located at Newburgh, New York, seeks compensatory and punitive damages, as well as injunctive relief. By motion docketed November 13, 1980 and fully submitted on February 24, 1981, defendants other than Cook moved to dismiss the various claims pleaded as against all defendants for want of subject

matter jurisdiction, failure to state a claim, and as time barred. Affidavits have been received and considered, together with all matters presented to the Court in a prior motion for a preliminary injunction. There are no disputed issues of fact which need be reached to resolve the motion, which is granted for the reasons stated below.

Plaintiff produces theatrical and artistic productions in Orange County and the mid-Hudson area, which it characterizes as "particularly reach[ing] and involv[ing] the Black and Hispanic communities." Plaintiff's purpose for incorporating "was to create a theatre which would reflect the cultural needs, aspirations and creativity of the Black and Hispanic communities of the mid-Hudson area."

Defendant Louis Heimbach is the County Executive of Orange County who is responsible for that County's application for and administration of all funds allocated to Orange County under the Comprehensive Employment and Training Act, 29 U.S.C. § 801, *et seq.* ("CETA"). Defendant Peter Replogle is the current Director of the Employment and Training Administration of Orange County, New York ("ETA"), the county agency responsible for administration of its CETA program. Defendant June Cook was the Director of ETA when the claims in this case allegedly arose in January and February 1978. Defendant Lawrence Gaskins is an employee of ETA. The County of Orange is also named as a defendant.

Plaintiff corporation claims that defendants have deprived it of its rights in violation of the due process and equal protection clauses of the Fifth and Fourteenth Amendments, and in violation of 42 U.S.C. §§ 1981, 1983, 1985 and 2000d, by denying on account of race its application for CETA funds for a "theatre arts" project, and by terminating CETA funding on account of race for two positions in HVFT. Plaintiff also claims that in so doing, defendants have violated CETA. Finally, plaintiff claims that defendant June Cook violated 26 U.S.C. §§ 7217 and 6103 by disclosing to the public that HVFT had failed to remit its third quarter 1978 withholding taxes to the Internal Revenue Service.

Subject matter jurisdiction in this Court is premised on 28 U.S.C. §§ 1331, 1343(1), (3) and (4), and 26 U.S.C. § 7217, and on the doctrine of pendent jurisdiction.

In support of its claims, plaintiff alleges and we assume the facts set forth below. In June 1977, the Orange County ETA granted plaintiff's application to be a subcontractor or subgrantee of CETA funds in the amount of $111,150.00. Plaintiff was to use the grant in a project for the physical restoration of the Dutch Reformed Church building in Newburgh, New York. In February 1978, however, plaintiff was informed by June Cook, then newly appointed as Director of the Orange County ETA, that the CETA job of "restoration trainee" in the church restoration project was to be abolished.

June Cook also informed HVFT in February 1978 that two Title II Public Employment positions "which the HVFT had were to be abolished by ETA due to lack of funds." In addition, it is alleged that two ETA youth programs which had been approved for HVFT as contractor in November 1977, and which were scheduled to begin in January 1978, were "inordinately delayed," with the reason given by ETA that "June Cook wanted verification that the HVFT was a 'community-based organization qualified to receive these grants.' " Because of this delay, one of HVFT's youth programs had to be cancelled.

The complaint also alleges that an application for $188,008.80 in CETA funds which was submittd by HVFT to the Orange County ETA in the Summer of 1978 was improperly denied. The application was entitled "Expansion of the Theatre Arts Industry Within the Greater Newburgh Community." Plaintiff alleges that in making a recommendation whether to accept this application, defendant Lawrence Gaskins, at the direction of June Cook, made "biased and perjurative (sic) comments" on the rating form, and that because of these comments the application was denied.[1] In July 1978 Curt Stewart, President and Artistic Director of HVFT,

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1 The nature and precise content of the pejorative comments have not been disclosed to the Court.

complained to the United States Department of Labor about claimed racial discrimination by the Orange County ETA. Mr. Stewart complained to the Department of Labor again in November 1978, mentioning particularly the denial of funding for HVFT's Theatre Arts project. In late 1978 and early 1979 the Department of Labor investigated these allegations, conducting an "overall Equal Employment Compliance Review" of the Orange County CETA program, simultaneously with its consideration of Mr. Stewart's complaint. Mr. James A. Ware, the Regional Administrator for Region II of the United States Department of Labor's ETA, informed Mr. Stewart by letter in July 1979 that the investigation had not substantiated HVFT's allegations of racial discrimination, but did direct that the two abolished PSE positions in complainant's workforce should be "immediately restored." Mr. Ware proposed that HVFT be allowed to resubmit its theatre arts project application or a substitute as a remedy because his investigation had found that the project had been improperly evaluated. HVFT wrote to Mr. Ware stating that these suggested remedies were inadequate; HVFT requested that it be awarded damages instead. Mr. Ware informed the HVFT that the Department of Labor does not award damages in such situations.

Plaintiff also alleges that in December 1978 at a public session of the ETA Advisory Council, June Cook stated that HVFT had not paid its third quarter withholding taxes to the Internal Revenue Service. Finally, plaintiff alleges that during the Spring and early Summer of 1978 June Cook made a number of derogatory comments about HVFT and Curtis Stewart. Ms. Cook allegedly criticized HVFT privately and publicly by stating that the HVFT "did not have non-CETA personnel supervising CETA personnel, and that therefore HVFT was in violation of CETA regulations," although plaintiff asserts that during the period in question "there was no CETA regulation, law or policy mandating that it was improper for a CETA paid employee to supervise other CETA employees." Ms. Cook also allegedly "initiated inquiries into the personal life-style and sexual relations" of Mr. Stewart.

Upon filing the complaint in this action on October 17, 1980, plaintiff moved by order to show cause for a preliminary injunction returnable October 27, 1980. Plaintiff requested that defendants be preliminarily enjoined (1) to pay plaintiff $12,500.00 as damages for defendants' unlawful abolition of the two Title II PSE positions, and (2) to pay plaintiff $188,008.80 for the institution and completion of the theatre arts project, or alternatively, to re-evaluate HVFT's application for CETA funding for the theatre arts project. On the return date, the motion for a preliminary injunction was withdrawn by the plaintiff upon a stipulation that plaintiff would submit an application for CETA funding for a "theatre arts" project for the 1980-81 fiscal year, and that defendant Orange County ETA would evaluate the application fairly in the ordinary course of its business.

Defendants assert in support of their motion that plaintiff lacks standing to maintain its claims of discrimination on account of race; that claims under CETA therefore must be dismissed for lack of jurisdiction; that the allegations under 26 U.S.C. §§ 7217 and 6103 fail to state a claim upon which relief can be granted, and that all claims of racial discrimination against Orange County are barred by the special New York statutes of limitations affecting municipal corporations and governmental subdivisions.

Defendants assert, and the Court agrees, that because plaintiff HVFT, as a corporation, has no racial identity, it cannot have been the target of any racial discrimination, and therefore has no standing to maintain its claims under the Civil Rights laws and the Fifth and Fourteenth Amendments.

The standing doctrine in federal court comprises both constitutional requirements and prudential limitations. To satisfy the constitutional Article III jurisdictional requirement that a "case or controversy" has been presented to the Court, a plaintiff must show that it has suffered a "distinct and palpable injury, " and that a "fairly traceable connection" exists between this injury and the defendants' challenged actions. *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59, 72 (1978); *Village of Arlington Heights* v. *Metropoli-*

tan Housing Development Corp., 429 U.S. 252, 261 (1977); *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Prudential limitations on standing, founded on considerations of judicial restraint, have also been articulated by the Supreme Court, although the elements of these limitations have not been stated as clearly as have the Article III requirements. In *Data Processing Service v. Camp*, 397 U.S. 150, 153 (1970), the Supreme Court stated that prudential limitations involved the question "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the [relevant] statute or constitutional guaranty." *See Warth v. Seldin, supra*, at 500-01. More recently, however, the Supreme Court has suggested that plaintiffs need not "demonstrate a connection between the injuries they claim and the constitutional rights being asserted," except in the context of taxpayer suits. *Duke Power Co. v. Carolina Env. Study Group, supra*, at 78-80. One prudential limitation on standing has been reiterated in recent cases, however: a plaintiff must assert his own rights and not the rights of third parties, unless the plaintiff can show that exceptional circumstances justify the assertion of the rights of these third parties. *Id.* at 80-81.

In deciding whether such special circumstances are present, a Court will consider the relationship of the plaintiff to the third party, as well as whether or not the third party is able to assert his or her own rights. *See Singleton v. Wulff*, 428 U.S. 106, 115-16 (1976).

In the instant case, plaintiff quite clearly has asserted that it has been economically injured in its own right by the defendants' denial and termination of CETA funding.[2]

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2 Plaintiff's assertion that the concept of "injury" has been expanded to include injuries other than economic, is, of course, correct. *See United States v. SCRAP*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Data Processing Services v. Camp*, 397 U.S. 150, 157 (1969). As plaintiff has clearly alleged an economic injury in this case, this Court need not examine the outer reaches of the injury-in-fact requirement.

Whether there is a causal connection between defendants' alleged racial discrimination and this injury is a closer question. Plaintiff apparently contends that the denial and termination of funding would not have occurred absent racial discrimination by the defendants. Because the demands are many and the funds are limited, numerous factors must be involved in any funding decision under CETA. However, we are concerned here only with the well pleaded allegations of fact, and need not go beyond the face of the pleading. For purposes of this motion, although the point is not free from doubt, the Court assumes that a sufficient causal connection between the injury and the alleged racial discrimination has been or could be pleaded so as to survive the motion; this notwithstanding the express findings of the Regional Administrator of CETA, noted above, that the allegations of racial discrimination could not be substantiated.

Defendants' motion to dismiss for lack of standing relies heavily on the following language from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977):

> "Clearly MHDC [plaintiff] has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning. . . . But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre*. Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. *As a corporation, MHDC has no racial identity and cannot be the target of the petitioner's alleged discrimination.* In the ordinary case, a party is denied standing to assert the rights of third persons . . . . But we need not decide whether the circumstances of this case would justify departure from that prudential limitation and permit MHDC to assert the constitutional rights of its prospective minority tenants . . . . For we have at least one individual plaintiff who has demonstrated standing to

assert these rights as his own." (Citations omitted) (Emphasis added).

This Court can find no basis for distinguishing *Arlington Heights* from the instant case. In this case, as in *Arlington Heights,* a plaintiff corporation is asserting that it has been injured by racially discriminatory actions on the part of defendants. Yet, *Arlington Heights* states that a corporation, as a faceless creature of the state, may not assert claims of racial discrimination under the Fourteenth Amendment on its own behalf, and cannot be the "target" of racial discrimination.

Arlington Heights apparently holds that the equal protection clause of the Fourteenth Amendment protects individuals, or actual persons having a racial identity, and not, as plaintiff suggests, corporations or artificial persons with an "amorphous" racial identity, or no racial identity. This would be true whether, as here, the corporation produces theatrical events for the delectation of individuals who are members of a racial minority or whether as in *Arlington Heights* the corporation builds housing for such individuals.

Because HVFT's claims under 42 U.S.C. §§ 1981, 1983, 1985 and 2000d are based on underlying allegations that defendants have violated the Equal Protection Clause of the Fourteenth Amendment,[3] the rationale of *Arlington Heights*

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3 In the complaint, plaintiff alleges, in relevant part that:

"71. Defendants have carried on, and in fact are continuing to carry on, a racially discriminatory program and discriminatory actions against the Plaintiff in violation of 42 U.S.C. Sec. 2000d (Title VI of the Civil Rights Act of 1964).

72. The rights sought to be secured in this action are rights secured by Acts of Congress providing for equal rights and for the protection of civil rights, to wit, 42 U.S.C. Sec. 2000d and 42 U.S.C. Sec. 1983.

73. By their actions as described above in this Complaint, the Defendants have violated Plaintiff's rights under 42 U.S.C. Secs. 2000d and 1983 by:

(a) Denying certain benefits to the Plaintiff because of race;

(b) Subjecting the HVFT to different treatment than other CETA sub-contractors because of race;

(footnote continued)

applies to these claims, as well as to claims based directly upon the Equal Protection Clause of the Fourteenth Amendment.

Plaintiff, although not citing *Arlington Heights*, attempts to avoid its result by citing cases in which membership organizations or corporations were allowed standing to assert their own rights. In none of those cases, however, was a corporation or membership organization accorded standing to assert that it had suffered injury as a result of racial discrimination in violation of the Equal Protection Clause. *See, e.g., Allee v. Midrano*, 416 U.S. 802 (1974) (labor union claimed violation of its rights to due process of law and freedom of speech and assembly); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963) (membership organization claimed its right to freedom of speech and association had been violated).

Plaintiff here cannot avoid the conclusion that in claiming its CETA funding as a subcontractor was denied or terminated on account of racial discrimination, HVFT is really attempting to assert the rights of individual persons belonging to racial minorities.

Although the Supreme Court in *Arlington Heights* left open the issue of third-party standing by corporations claiming racial discrimination on behalf of their members, this Court need not consider whether plaintiff in this case could assert standing to sue on behalf of any aggrieved third parties. This is so because plaintiff has expressly disavowed any attempt to sue on behalf of its "officers, directors, employees, or constituents," and has stated that it "is asserting its own rights and is not relying on any violations that may have also affected the rights of anyone else."[4] Under these circumstances, this Court

---

(c) Using criteria which have subjected the HVFT to discrimination because of race;

(d) Discriminating against the HVFT in a program conducted in a facility partially restored with Federal funds;

(e) Subjecting the HVFT to discriminatory employment and contracting practices in a Federal program intended to provide employment."

4 Quoted from plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss the Complaint, at 2.

is bound by the prudential limitations on third-party standing, and plaintiff has not overcome these limitations by stating reasons for the necessity or desirability of its representation of any aggrieved third parties. *See, Singleton v. Wulff,* 428 U.S. 113-114 (1976).

For these reasons, plaintiff's claims pursuant to 42 U.S.C. §§ 1981, 1983, 1985 and 2000d are dismissed for lack of standing. Rule 12(b)(6), F.R.Civ.P.

Defendants argue that when the claims brought under the Constitution and the Civil Rights laws have been dismissed, the claims brought under CETA must be dismissed for lack of pendent jurisdiction, or, alternatively, for failure to exhaust administrative remedies. In its complaint, HVFT states that its CETA claims are pendent to the constitutional claims; in its brief, however, HVFT implies that independent jurisdiction exists for these claims, but does not cite the jurisdictional predicate.

This Court must first determine the nature of HVFT's claims brought pursuant to CETA. For its third claim pleaded, plaintiff alleges that defendants have violated CETA, "the regulations and directives promulgated thereunder and agreements adopted pursuant thereto," but does not specify which provisions of the Act or which regulations have been violated.

Plaintiff does allege that defendant Orange County ETA breached an agreement with HVFT which provided that it would fund the position of restoration trainee in HVFT's church restoration project. This is basically a contract claim. Because the parties in this action all are citizens or residents of New York, there is not complete diversity. Thus there can be no subject matter jurisdiction of this contract claim, unless appended to another claim of which this Court has subject matter jurisdiction.

Our Court of Appeals has held that CETA does not provide for an express or an implied right of action for damages by individual program participants against "prime sponsors" such as the Orange County ETA. *CETA Workers' Organizing Committee v. City of New York,* 617 F.2d 926, 929,34 (2d Cir. 1980). It follows, *a fortiori,* if the recipients of the training

under the Comprehensive Employment and Training Act, those for whose especial benefit the statute was enacted, have no implied right of action against a prime sponsor under the Act, then surely a mere subcontractor or subrecipient, as is plaintiff, cannot state a claim based on any such implied right.

To the extent founded on contract the CETA claims must be dismissed for want of subject matter jurisdiction. To the extent founded on a claimed implied action for breach of a statutory duty, they must be dismissed for failure to state a claim.

The complaint states that plaintiff's claim for damages for disclosure of HVFT's tax delinquencies is founded on 26 U.S.C. § 7213. Because that section concerns only criminal liability, the Court will treat this portion of the complaint as asserting a claim under § 7217. Plaintiff seeks damages from all defendants except Replogle and Gaskins, because Ms. Cook, while serving as ETA Director of Orange Country, became aware of the fact that HVFT had withheld payroll taxes from its employees and had failed to remit to the Internal Revenue Service. She divulged this fact at a public session of the ETA Advisory Council, a body concerned with the approval or disapproval of subcontractors and the administration of CETA grants.

The information, if true (and it is not alleged to be false), was relevant to the duties of the Advisory Council. Tax monies withheld from employees are trust funds, 26 U.S.C. § 7501; failure to remit can incur serious civil and criminal penalties which may impair the ability of a sponsor or subcontractor to function.[5] That an employer would intentionally divert or fail to remit such withholding taxes suggests a moral indifference to the law, and is arguably relevant to the suitability and competence of the management of a CETA contractor such as

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5 Section 3403 of the Internal Revenue Code provides that an employer shall be liable for the payment of withholding taxes. Section 6672(a) imposes substantial monetary penalties (up to 100%) for the wilfull failure to pay such taxes, and Section 7202 provides that a wilfull failure to pay such taxes is a felony, punishable by a fine of not more than $10,000 or imprisonment of not more than five years.

plaintiff. The Court finds no wrongdoing on the part of Ms. Cook. Also, this branch of the complaint fails to state a claim.

Section 7217(a) of the Internal Revenue Code, 26 U.S.C. § 7217(a), provides for a civil right of action:

> "Whenever any person knowingly, or by reason of negligence, discloses a return or return information (defined in section 6103(b)) with respect to a taxpayer in violation of the provisions of section 6103, such taxpayer may bring a civil action for damages against such person, and the district courts of the United States shall have jurisdiction of any action commenced under the provisions of this section."

The definition of "return information" incorporated by reference from § 6103(b) of Title 26 is arguably sufficient to include the tax liability of HVFT for withheld but unremitted payroll taxes.

However, § 7217(a) by its express terms imposes civil liability only on a person who has disclosed "return information" in "violation of the provisions of section 6103 . . . ."

Section 6103(a) sets out its "general rule" as follows:

> "(a) General rule.—Returns and return information shall be confidential, and except as authorized by this title—
>
> (1) no officer or employee of the United States
>
> (2) no officer or employee of any State or of any local child support enforcement agency who has or had access to returns or return information under this section, and
>
> (3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), subsection (m)(4)(B), or subsection (n),
>
> shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term 'officer or employee' includes a former officer or employee."

As can be seen, the prohibition against disclosure does not extend to any person, *e.g.*, a journalist, coming into the possession of confidential tax information and disclosing it. This carefully drawn statute, intended to avoid possible First Amendment implications, was not violated by Ms. Cook because she was not an "officer or employee of the United States," nor an "officer or employee of any State or of any local child support enforcement agency," [*see* § 6103(1)(6)]. Nor did she obtain access to any "return information" in the capacity of a shareholder of HVFT or any corporation [*see* § 6103(e)(1)(D)(iii)]; nor as an officer of an educational institution for the purpose of collecting student loans [*see* § 6103(m)(4)(B)], nor as a person processing return information for purposes of tax administration [*see* § 6103(n)].

Accordingly, because any disclosure of return information by June Cook is not prohibited by § 6103, since she is not within the categories of persons regulated thereby, plaintiff states no claim against her, or against Heimbach or Orange County, under § 7217.

Defendants' motion to dismiss plaintiff's claims based on public disclosure of plaintiff's tax delinquency is granted pursuant to Rule 12(b)(6), F.R.Civ.P.

Defendant County of Orange has also moved to dismiss the claims brought pursuant to the Civil Rights laws on the ground that these claims are time-barred. In view of the foregoing determinations, this Court need not reach or consider whether the statute of limitations against the County had run before plaintiff filed this action. *See Collins v. Town of Goshen,* Dkt. No. 80-7312 (2nd Cir. October 22, 1980); *Quinn v. Syracuse Model Neighborhood Corp.,* 613 F.2d 438, 449 (2d Cir. 1980).

The Clerk shall enter judgment dismissing the Complaint. No costs.

So Ordered.

Dated: New York, New York
May 5, 1981

CHARLES L. BRIEANT
Charles L. Brieant
U.S.D.J.

District Court Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civil 5914 (CLB)

HUDSON VALLEY FREEDOM THEATRE, INC.,

Plaintiff,

—against—

LOUIS HEIMBACH, individually and as the Orange County Executive, et al.,

Defendants.

JUDGMENT

All defendants other than June Cook having moved to dismiss and the said motion having come before the Honorable Charles L. Brieant, United States District Judge, and the Court thereafter on May 5, 1981, having handed down its memorandum and order granting the said motion, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed as to all defendants.

Dated: New York, N.Y.
May 8, 1981

s/ RAYMOND F. BURGHARDT
Clerk

Court of Appeals Order Denying Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 81-7425

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the day of , one thousand nine hundred and eighty-two.

HUDSON VALLEY FREEDOM THEATER, INC.,

Plaintiff-Appellant,

—v.—

LOUIS HEIMBACH, individually and as the Orange County Executive; PETER REPLOGLE, individually and as the Director of the Orange County Employment and Training Administration; JUNE COOK, individually and as former Director of the Orange County Employment and Training Administration; LAWRENCE GASKINS, individually and as an employee of the Orange County Employment and Training Administration and the COUNTY OF ORANGE,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Louis Heimbach et al.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

by FRANCIS X. GINDHART
Chief Deputy Clerk

Constitutional and Statutory Provisions

UNITED STATES CONSTITUTION

AMENDMENT XIV DUE PROCESS AND EQUAL PROTECTION CLAUSES

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

> Section 1. * * * No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981. Equal rights under the law.

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exaction of every kind, and to no other.

CIVIL RIGHTS ACT OF 1871

42 U.S.C. § 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding

for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985. Conspiracy to interfere with civil rights.

Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to

any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

CIVIL RIGHTS ACT of 1964; Tit. VI; Section 601

42 U.S.C. § 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

FILED
AUG 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOUIS HEIMBACH, individually and as the Orange County Executive; PETER REPLOGLE, individually and as the Director of the Orange County Employment and Training Administration; JUNE COOK, individually and as former Director of the Orange County Employment and Training Administration; LAWRENCE GASKINS, individually and as an employee of the Orange County Employment and Training Administration and the COUNTY OF ORANGE,

Petitioners,

—against—

HUDSON VALLEY FREEDOM THEATRE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

WILLIAM M. KUNSTLER
Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

C. VERNON MASON
250 West 57th Street
New York, New York 10107
(212) 586-5120

MARK B. GOMBINER
13 Gay Street
New York, New York 10014
(212) 924-5661

Attorneys for Respondent

WILLIAM M. KUNSTLER
Of Counsel

Dated: New York, N.Y.
August 18, 1982

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982
No. _____

LOUIS HEIMBACH, et al.,
Petitioners,
-against-
HUDSON VALLEY FREEDOM THEATRE, INC.,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent, Hudson Valley Freedom Theatre, Inc., by its undersigned counsel, pursuant to Rule 22 of this Court, respectfully opposes the Petition for a Writ of Certiorari submitted by Herbert Dicker, Esq., on behalf of petitioners, to review the judgment of the United States Court of Appeals for the Second Circuit in this case. Leave to submit the within Brief in Opposition, by August 19, 1982, has been granted by Honorable Alexander Steves, Clerk of the Court.

REASONS FOR DENYING THE WRIT

Introduction

Petitioners ask this Court to rule that corporations are without standing to maintain suits for acts of racial discrimination. This proposed determination is unnecessary, unsupported, and unwise. The single line of dicta upon which petitioners premise their argument */ has not and need be read so as to work a radical reinterpretation of traditional standing tests and the purpose of the thirteenth and fourteenth amendments and the civil rights laws.

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*/ "[A] corporation, as a faceless creature of the state, may not assert claims of racial discrimination on its own behalf and cannot be the target of racial discrimination." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 253, 263.

ARGUMENT

I. THE QUESTION OF CORPORATE RACIAL IDENTITY NEED NOT BE DETERMINED.

Petitioners' writ may be denied without reaching the issue of corporate racial identity. Hudson Valley Freedom Theatre, Inc. (HVFT) may maintain an action for racial discrimination, even if its technical lack of racial character is assumed. The fundamental right to be free from official racial discrimination, as embodied in the thirteenth and fourteenth amendments and civil rights laws, gives HVFT standing to seek redress for racially motivated wrongs which have caused it direct injury.

This Court, as Justice Pierce noted in his concurring opinion below, has repeatedly held that all persons may invoke the powers of the civil rights laws when

injured by state-sanctioned racial animus. Thus, in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237, the Court held that a white person had standing to sue when "punished for trying to vindicate the rights of minorities." McDonald v. Santa Fe Trail Transportation Company, 427 U.S. 273, 295, holds that 42 U.S.C. §1981 was "meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." See also Barrows v. Jackson, 346 U.S. 249.

A possible absence of racial identity will not, therefore, deprive a corporation of standing in matters of racial discrimination. The civil rights laws and the thirteenth and fourteenth amendments were enacted to eliminate state-sanctioned racial discrimination. Buchanan v. Warley,

245 U.S. 60. In construing the reach of 42 U.S.C. §1983, this Court has noted the words of Representative Shellaberger, one of the drafters of the civil rights laws:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous, were this not the rule of interpretation. As has been again and again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all people. . . Chief Justice Jay and also Story say: 'Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally and it is generally adopted in the interpretation of laws. 1 Story on Constitution, §429.

Globe App. at 68. Cited in Monell v. Department of Social Services of the City of New York, 436 U.S. 678, 683.

II. THERE IS NO CONFLICT IN THE CIRCUITS OVER THE QUESTIONS RAISED BY PETITIONERS.

Five years have elapsed since the decision in Arlington Heights. Yet, petitioners are unable to point to, and respondent has been unable to find, a single case in which the dictum cited by petitioners has stripped a corporation of standing in a civil rights suit. Every court which has considered the issue has found a basis for corporate standing.

Marshall v. Kleppe, 637 F. 2d 1217 (9th Cir. 1980) held that a corporation had standing to sue the Small Business Administration for claimed racial discrimination. T and S Service Associates, Inc. v. Crenson, 505 F. Supp. 938 (D.C.R.I. 1981) found that a corporation (though not its Black shareholders) had standing to sue for racial bias under 42 U.S.C.

§§1981, 1983 and 2000d.*/ The court in Howard Security Services, Inc., v. Johns Hopkins Hospital, 516 F. Supp. 508 (D.C. Md. 1981) was uncertain of corporate standing under 42 U.S.C. §1981, but noted this would rarely be a critical problem because a corporate action would always be

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*/ Respondent has also sued under 42 U.S.C. §2000d. This statute, which was not at issue in Arlington Heights, states that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." As the court below declared, there is no reason to believe that corporations are outside the protection of this statute.

proper under 42 U.S.C. §1983. Gordon v. City of Cartersville, Georgia, 522 F. Supp. 753, 757 (N.D. Ga. 1981), declared that a white partnership had standing to sue under the civil rights laws because of "its own right to be free from injury generated by the defendant's racially motivated conduct."

The Second Circuit's decision is consistent with that of all other post Arlington Heights tribunals which have faced the question of corporate standing in civil rights suits. The Court is not obliged to further address a non-existent controversy.

III. CORPORATIONS ARE ENTITLED TO EQUAL PROTECTION AND DUE PROCESS OF LAW.

Since Santa Clara County v. Southern Pacific R.R. Co., 118 U.S. 394, corporations have enjoyed the protection of the fourteenth amendment. It is now black-letter law that:

> [A] corporation is a 'person' within the meaning of the equal protection and due process of law clauses of the Fourteenth Amendment, Grosjean v. American Press Co., 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936); Adams v. City of Park Ridge, 293 F. 2d 585 (7th Cir. 1961); Advocates for Arts v. Thompson, 532 F. 2d 792 (1st Cir. 1976); Raymond Motor Transportation, Inc. v. Rice, 417 F. Supp. 1352 (3-judge Dist. Ct. W.D. Wisc. 1976). Accordingly, Fulton, the corporate plaintiff, may maintain a §1983 action to secure the protection and guarantees accorded to it under the Fourteenth Amendment.

Fulton Market Cold Storage Co. v. Cullerton, 582 F. 2d 1071, 1079 (7th Cir. 1978).

Under the aegis of the fourteenth amendment and 42 U.S.C. §1983, corporations have brought suit for everything ranging from a claimed denial of due process in bank certification procedures (Roslindale Co-op Bank v. Greenwald, 481 F. Supp. 749 (D.C. Ma. 1979)) to alleged discrimination for printing a poem entitled "Castrating the Cat." (Advocates for the Arts v. Thomson, 532 F. 2d 792 (1st Cir. 1976)).

Petitioners now ask this Court to hold, however, that a corporation, because of its artificial character, may not utilize the fourteenth amendment and civil rights laws, to combat racial discrimination -- the very evil which the statutes seek to prevent. Petitioners contend that "Race and color are but two of the inherently personal characteristics for which only natural persons may suffer direct

injury." (Petition for Certiorari at 9). This argument is without merit. A corporation cannot literally "speak" (any more than it can literally have a race) yet it has a constitutional right to free speech (First National Bank of Boston v. Bellotti, 435 U.S. 765). To assert that an artificial "person" may not be the victim of racial discrimination is akin to saying that the tin man in The Wizard of Oz couldn't be hurt because he didn't have a heart.

IV. PETITIONERS' POSITION WOULD ENCOURAGE UNNECESSARY LITIGATION AND INVERT TRADITIONAL STANDING TESTS.

The tests for standing set forth by this Court are best satisfied by allowing a corporation which has suffered harm as a result of racial discrimination to seek redress in its own right. Petitioners' arguments in this regard are puzzling since they concede that

> Significantly, absent special circumstance, '[a litigant] must assert his own legal interests rather than those of third parties.' Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (citations omitted). '. . . [T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' Warth v. Seldin, 422 U.S. 490, 499 (1975) (citations omitted).

Petition for Certiorari at 11.

As the court below held:

> HVFT is in a better position than anyone else to challenge discriminatory practices leading to cutting its grant funds. In addition, HVFT has a far more solid claim of injury in fact than would any resident who would have to allege an interest in attending as yet unannounced productions, or a prospective employee who might be only one of many that would seek to apply for positions not yet offered as a result of ETA's denial of the grant. It would indeed be paradoxical if prudential standing considerations were to limit the range of permissible plaintiffs in a case like this to those who would be required to file complaints indulging in the sort of speculation which the Court has found suspect under its constitutional standing analysis. See Warth v. Seldin, supra, 422 U.S. at 502-08.

Hudson Valley Freedom Theatre v. Heimbach, 671 F. 2d 702 (2d Cir. 1982) at 709.

Additionally, should petitioners' standing test be adopted, a corporation, owned entirely by Black shareholders, would be without remedy for acts of racial

animus directed against the corporation. The shareholders would be barred from maintaining an action because the damage was to the corporation (Smith v. Martin, 542 F. 2d 688 (6th Cir. 1976); Erlich v. Glasner, 418 F. 2d 226 (9th Cir. 1969)), and the corporation could not sue because of its purported lack of racial identity. As Judge Friendly noted (Hudson Valley at 706), this would be a most anomalous result.

Moreover, there is little reason to suspect that a corporation so injured would not avail itself of other litigation devices. Encouraging a corporation to resort to artificial third-party plaintiffs is a distinctly unuseful approach to standing.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,*/

WILLIAM M. KUNSTLER
Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003
(212) 674-3303

C. VERNON MASON
250 West 57th Street
New York, N.Y. 10107
(212) 586-5120

MARK B. GOMBINER
13 Gay Street
New York, N.Y. 10014
(212) 924-5661

WILLIAM M. KUNSTLER
Of Counsel

Dated: New York, New York
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